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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

JEFFREY EPPERSON,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant;

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Real Party in Interest and
Respondent.

C065353

(Super. Ct. No. 46529)

Plaintiff Jeffrey Epperson was terminated from his position as a correctional sergeant employed by the Department of Corrections and Rehabilitation (the department) at High Desert State Prison in Susanville, California, as a result of an incident during transportation of an inmate at the prison's administrative segregation unit. The termination was upheld by the State Personnel Board (the board).

Plaintiff appeals from the judgment denying his petition for a writ of mandate to overturn the board's decision. He contends the trial court committed prejudicial error when it found his testimony was not credible, he knowingly failed to include the use of force in his written reports in an effort to cover up another officer's improper use of force, and his dismissal was appropriate. Since the board's decision was supported by substantial evidence, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2004, inmate Donald Williams (inmate Williams) was serving six life terms without parole plus 19 years at High Desert State Prison. Due to the nature of his commitment offense and his prison disciplinary history, he was housed in the prison's Z unit, an administrative segregation unit which houses recalcitrant inmates with a history of assaulting other inmates and staff, often by spitting or throwing bodily fluids.

Between August 2005 and May 2006, hearings were held before an administrative law judge (ALJ) for the board regarding an incident involving, among others, plaintiff and inmate Williams, and which ultimately resulted in plaintiff's termination. Plaintiff testified at the hearings, as did many other witnesses. The board's findings of fact were, in pertinent part, as follows:

Plaintiff began working for the department in 1996. On June 23, 2004, he was working as shift supervisor at the Z unit, along with Officers Braida and Williams, who were assigned the task of escorting inmates, including inmate Williams, from the

walk-alone cells in the yard to their assigned cells inside the facility.

Officer Braida discovered a nipple ring on inmate Williams during a body search and ordered him to remove it. Inmate Williams became upset and removed the ring and threw it on the ground outside the cell.

Plaintiff arrived to assist with transportation of inmate Williams. Plaintiff, Officer Braida and Officer Williams all wore face shields. Officer Williams handcuffed inmate Williams behind the back, unlocked the cell door, and took inmate Williams's arm to escort him out of the cell. As inmate Williams backed out of the cell, he spun around and tried to break free of Officer Williams's hold. Officer Braida jabbed him twice with a baton.¹ Plaintiff and Officer Williams both observed Officer Braida's use of the baton.

Plaintiff stepped in and, with the help of Officer Williams, gained control of inmate Williams and took him to the wall. Inmate Williams stood facing the cement wall, with Officer Williams standing to his left and holding his left arm, plaintiff standing to his right and holding his right arm, and Officer Braida standing behind him. Inmate Williams turned his head toward plaintiff. While all three officers testified that they believed inmate Williams was going to spit on plaintiff, plaintiff and Officer Williams both testified they were not

¹ The ALJ found this act to be a reasonable use of force.

looking at inmate Williams's head, and inmate Williams neither made spitting noises nor did he spit. Officer Braida placed both of his hands on inmate Williams head and neck area, lifted himself off the ground several inches and hoisted himself on inmate Williams's shoulders. He then dropped off of inmate Williams, took a step back and, with his right hand, pushed inmate Williams's head into the wall.²

Inmate Williams was escorted back to his cell, where he complained that the force used by Officer Braida was excessive. He prepared a written complaint alleging the same.

Three stationary video cameras recorded different angles of the incident. Shortly after the incident, plaintiff, Officer Braida and others viewed the videotapes of the incident.³ The tapes clearly show Officer Braida jabbing inmate Williams with the baton and pushing inmate Williams's head into the cement wall.

Plaintiff and Officer Braida completed their written incident reports after viewing the videotapes. Officer Williams prepared his written report that day without having reviewed the videotapes. Plaintiff's report omitted any mention of Officer

² The ALJ found that inmate Williams "was fully under control and compliant at this moment and there was no reason for [Officer] Braida to push the inmate's head into the wall. [Officer] Braida's action was an unnecessary and an excessive use of force."

³ Officer Williams was not present during the review of the videotapes.

Braida's use of the baton or his act of pushing inmate Williams's head into the wall. Officer Braida's report included his use of the baton to control inmate Williams, but omitted any reference to pushing inmate Williams's head into the wall. All three officers testified that they only included in their reports what they personally observed at the time of the incident. Plaintiff and Officer Braida testified it was their belief they were only required to report what they observed at the time of the incident, not what they observed later during their review of the videotapes.

Officer Gonzalez was assigned the task of monitoring the videotapes. His written incident report omitted any mention of Officer Braida's use of the baton or pushing inmate Williams's head into the wall. Plaintiff reviewed Officer Gonzalez's report but did not ask him for clarification.

A videotaped use of force interview was conducted with inmate Williams and Sergeant Oberst. Inmate Williams stated his charges of excessive use of force were levied against Officer Braida only. Plaintiff attended the interview but did not conduct it. He testified it was his belief that, because he was not alleged to have used excessive force, his attendance was consistent with department policy. He also testified that, in retrospect, he used force when he held inmate Williams against the wall and, as such, should not have attended the interview.

At some later date, plaintiff and Officer Braida prepared supplemental rules violation reports alleging inmate Williams attempted to spit on plaintiff.

The board's findings also included credibility determinations which were, in pertinent part, as follows:

"All appellants' testimony at hearing is inconsistent with the videotaped record of the incident. The videotapes clearly show Braida pushing the inmate's head into the wall. As a result, a determination of credibility must be made pursuant to Evidence Code section 780. [Footnote omitted.] [¶] Braida, Cook and Epperson, who all observed the tapes before preparing their reports, testified that the tapes they observed were darker than the tapes they reviewed during their respective investigative interviews. The appellant's [sic] also testified that they believed that they were supposed to write in their reports what they observed at the time of the incident, not what they observed from videotape of the incident. These are their explanations for why uses of force are omitted from their reports. These explanations, however, are not consistent with other facts that they put in their reports which support their collective assertion of no wrongdoing. For example, Epperson, Braida and Williams all wrote in their reports that they believed the inmate was going to spit. None, however, heard any spitting noises or observed the inmate spit. [¶] . . . [¶] Epperson testified that he never saw Braida use his baton or push the inmate's head into the wall. The videotape, however, clearly shows Epperson looking directly at the baton strike when Braida hit the inmate with the baton. [¶] . . . [¶] Finally, all of the testimony of the appellants is self-serving. Applying the factors set forth in Evidence Code section 780, the

testimony of Cook, Epperson, Braida and Williams is not credited."

DISCUSSION

I

Standard Of Review

In reviewing disciplinary actions, "the Board acts in an adjudicatory capacity," "much as a trial court would in an ordinary judicial proceeding. Thus, the Board makes factual findings and exercises discretion on matters within its jurisdiction. On review the decisions of the Board are entitled to judicial deference. The record must be viewed in a light most favorable to the decision of the Board and its factual findings must be upheld if they are supported by substantial evidence. [Citation.] In addition, the Board's exercise of discretion must be upheld unless it abuses that discretion." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823.) Abuse of discretion is shown if the board's decision is not supported by its findings. (See Code Civ. Proc., § 1094.5, subd. (b).)

"The substantial evidence rule measures the quantum of proof adduced at a hearing and assesses whether the matters at issue have been established by a solid, reasonable and credible showing. . . . [¶] The abuse of discretion standard, on the other hand, measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." (*Department of Parks &*

Recreation v. State Personnel Bd., *supra*, 233 Cal.App.3d at pp. 830-831.)

Our scope of review on appeal from a judgment in a case like this is identical to that of the trial court. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.)

II

Sufficiency Of The Evidence

Plaintiff contends there was insufficient evidence that his testimony was in direct conflict with what was captured on the videotapes because the video entered into evidence at the hearings "is not the original video tape [sic] of the incident nor a copy thereof," but rather "an enhanced, altered and magnified digital video disk." He asserts that exhibit 5 "is the only basis for the ALJ's credibility determination and finding that [plaintiff] was dishonesty [sic]," that exhibit 5 shows him wearing a face shield that "blocks a clear view of [his] line of sight," and that he "testified without rebuttal that at the time of the incident he was focused on [inmate Williams's] facial area to prevent an assault and did not see [Officer] Braida's use of the baton until a subsequent viewing of the video tapes [sic]." He adds that he testified Officer Braida was behind him while inmate Williams was against the wall. All of these facts, he urges, demonstrate that exhibit 5 does not support the board's findings and thus those findings are not supported by substantial evidence. We disagree.

The board essentially found that plaintiff was present and saw Officer Braida strike inmate Williams twice with the baton (a reasonable use of force); he was holding inmate Williams against the wall when Officer Braida hoisted himself onto inmate Williams's shoulders, then dropped off and pushed the inmate's head into the cement wall (an unnecessary and excessive use of force); despite his testimony that he thought inmate Williams was going to spit, neither he nor Officers Braida or Williams saw inmate Williams spit or heard any noises indicating the inmate was going to spit; and, after viewing the original videotapes, he completed his incident report, omitting any mention that Officer Braida struck the inmate with the baton or pushed the inmate's head into the cement wall.

The board also found that plaintiff's testimony was inconsistent with the videotapes, which "clearly show [Officer] Braida pushing the inmate's head into the wall," and that his explanations for why use of force was not included in his report -- that is, the original videos he observed were darker than the tapes he later observed, and he believed he was supposed to report only what he observed at the time of the incident -- were not consistent with other facts in his report supporting his assertion of no wrongdoing. The board also found inconsistencies between plaintiff's claim that he did not see Officer Braida strike inmate Williams with the baton or push his head into the wall, and the video as shown on exhibit B, which the board found "clearly shows [Officer] Braida pushing the inmate's head into the wall" and "clearly shows [plaintiff]

looking directly at the baton strike when [Officer] Braida hit the inmate with the baton."

These findings are sufficient to support the board's determination that plaintiff testified dishonestly about whether he saw the uses of force by Officer Braida at the time of the incident. "[I]t is enough if the falsehoods the personnel board deemed to constitute dishonesty could be accepted by a reasonable mind as substantial evidence in support of that deduction." (*Cvrcek v. State Personnel Bd.* (1967) 247 Cal.App.2d 827, 830.)

Plaintiff contends that because exhibit 5 "is not the original video tape [sic] of the incident nor a copy thereof" and "is an enhanced, altered and magnified digital video disk," it cannot support the board's finding that he was looking at Officer Braida at the time of the baton strikes or that he was dishonest in his reporting of the incident. We are not persuaded. The three original videotapes, each recording a different view of the incident, were later enhanced and clarified, with portions of over-recorded images restored where possible, and then compiled together onto a DVD (exhibit 5). The enhanced, clarified version of the video did not add anything that was not already contained in the original video. As the forensic expert testified, clarification of the video allows one to "see what's already there, but it doesn't make anything there that was not already there."

Plaintiff claims he testified, without rebuttal, that because he was focused on the inmate's facial area at the time

of the incident, he did not see Officer Braida's use of the baton. It is true he testified he did not see Officer Braida use the baton or push the inmate's head into the wall as the incident was happening. It is also true that he testified he first saw the baton strikes when he viewed the original videotapes approximately one hour after the incident, and did not see Officer Braida "make contact with the back of [inmate Williams's] head until he viewed the DVD (exhibit 5) just prior to his investigative hearing." However, he gave a differing version of events during an interview by the department's internal affairs, telling the investigator that after the incident he "asked Braida . . . 'cause Braida told me that he struck the guy a couple time[s] with his - his baton. I go, well - you know - number one, *it looked like to me you were blocking*. You know - but that's just my opinion. That's what it looked like." (Italics added.) That version of events is corroborated by exhibit 5, which shows plaintiff had a clear view of the baton strikes during the incident.

Plaintiff claims for the first time on appeal that exhibit 5 shows he was wearing a face shield that blocked his "clear view of [his] line of sight." However, there is no evidence plaintiff ever mentioned his shield blocked his view, nor was there any testimony to support that claim that it did, in fact, obstruct his view of the incident.

Plaintiff also claims he testified that Officer Braida "was behind him at the time [inmate Williams] was against the wall." Exhibit 5 confirms that Officer Braida was indeed standing

behind plaintiff while inmate Williams was to his left and just in front of him against the wall. However, exhibit 5 also shows that when Officer Braida pushed inmate Williams's head into the wall, Officer Braida's arm came within plaintiff's field of vision, giving plaintiff an unobstructed view of Officer Braida's actions.

The board stated it best when it found that, "As the old saying goes, 'a picture is worth a thousand words.' Whether the picture was darker or not, there is no escaping the conclusion that [Officer] Braida hoisted himself up on the inmate's back and pushed the inmate's head into the wall." There is also no escaping the conclusion that plaintiff, who was present during the incident and had a clear view of what occurred, saw Officer Braida strike inmate Williams with the baton and push inmate Williams's head into the wall.

The board's findings are supported by substantial evidence.

III

Credibility Determination

Plaintiff contends the evidence does not support the board's conclusion that he was dishonest for failing to report the use of force in an effort to cover up Officer Braida's improper use of force. We disagree.

The board found that "[plaintiff] and [Officer] Williams observed [Officer] Braida's use of force, but knowingly failed to include the use of force in their written reports in an effort to cover up [Officer] Braida's improper use of force. Furthermore, [plaintiff] never requested that his subordinate

officers make corrections to their reports consistent with their actions and observations of the incident. Both of these acts constitute inexcusable neglect of duty. [Plaintiff]'s and [Officer] Williams'[s] failure to report the incident was dishonest." Substantial evidence supports those findings.

We previously concluded in part II of this opinion that substantial evidence supports the board's finding that plaintiff saw Officer Braida strike inmate Williams with the baton and push his head into the cement wall at the time those events occurred. Therefore, we need only determine whether there is substantial evidence to support the board's finding that plaintiff knowingly failed to include those uses of force in his incident reports in an effort to affect a cover-up. We conclude there is.

Plaintiff wrote his report prior to leaving work on the day of the incident. His report did not include anything regarding Officer Braida using the baton, climbing up inmate Williams's back or pushing his head into the wall. He asserts that "he was trained to report only the force he observe[d] or was involved in at the time of the incident," but "was not trained to report observations made at a subsequent time." However, we need not decide whether the evidence supports plaintiff's assertions regarding his prior training because he also testified that he did not include the baton use or that Officer Braida's feet left the ground because he "didn't see it until [he] saw the video" that night and he "didn't see that with [his] own eyes." Given our previous conclusion to the contrary, these statements were

untrue and therefore support the board's finding that plaintiff saw Officer Braida use force at the time of the incident and knowingly failed to include that information in his report.

We find plaintiff's claim that he "contacted [Officer] Braida to insure he included his use of force in his [Braida's] report" is not supported by the evidence. Plaintiff testified that when Officer Braida turned in his report, plaintiff found it to be inadequate and "very undetailed," and "wadded it up, threw it in the trashcan [sic] and told him [Officer Braida] to start over and articulate every breath he took." Plaintiff said nothing specific about including information about the instances of use of force.

There is substantial evidence to support the board's findings regarding plaintiff's knowing failure to report Officer Braida's use of force.

IV

Penalty Of Dismissal

Finally, plaintiff claims his dismissal is excessive and a rejection of the concept of progressive discipline, and is a form of disparate treatment. We disagree on both counts.

"[W]hile the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, 'it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion.' [Citation.] In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent

to which the employee's conduct resulted in, or if repeated is likely to result in, '[harm] to the public service.' [Citations.]" (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217-218.)

In *Skelly*, a mandamus proceeding to review an administrative order dismissing the petitioning doctor for extending his lunch breaks "on numerous occasions, generally by five to fifteen minutes" and "twice leaving the office for several hours without permission," our State Supreme Court found that the discipline of dismissal was clearly excessive where the record was "devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service." (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 218.)

The court found that although the evidence showed Skelly's "transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs," and that he had "previously suffered a one-day suspension for similar misconduct," but for one or two isolated incidents, "it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties." (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 218.) The court also noted that the State Personnel Board, in making its findings, considered among other things Skelly's distinguished medical career and the fact that when he testified he "apologized for his conduct and promised to adhere strictly

to the rules if given another opportunity to do so." (*Id.* at p. 219.) The court concluded the penalty of dismissal "was clearly excessive and disproportionate to the misconduct on which it was based." (*Ibid.*)

Here, plaintiff asserts that his penalty was excessive because he did not engage in, or attempt to cover up, any misconduct, and there was no evidence he engaged in a code of silence or was involved in "damage to the public service." He points to his 15-year record of employment with "one unsustained allegation of adverse action in 2001," his "above standard performance evaluations" and his "reputation for truthfulness." He also urges that, if given additional training on reporting protocol, the possibility of recurrence "would be rare."

We note that, unlike *Skelly* who apologized for his conduct, plaintiff takes no responsibility for his conduct whatsoever, remaining intransigent in his denial of wrongdoing. In any event, having already concluded plaintiff engaged in misconduct and engaged in a code of silence, we reject plaintiff's argument that the penalty was excessive.

We also reject plaintiff's claim that because he has been an employee for 15 years, and has exhibited "above standard" work performance, progressive discipline was more appropriate. A public agency is not required to impose identical penalties for charges similar in nature. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230.) Moreover, the decision whether progressive discipline was appropriate is within the agency's discretion. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th

44, 76; *Talmo*, at p. 230.) Progressive discipline is not required in cases of serious willful misconduct. (*Rita T. Nelson* (1992) SPB Dec. No. 92-07 <<http://www.spb.ca.gov>>.)

We similarly reject plaintiff's final assertion that because Lieutenant Peery received a pay reduction "for conduct substantially similar" to his, dismissal constituted disparate treatment. Even if he can find other cases of misconduct which did not result in termination, "[w]hen it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties.' [Citations.]" (*Talmo*, at p. 230.)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.